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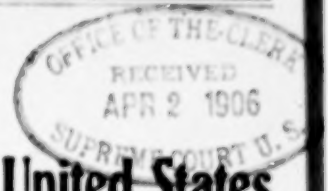

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

SECURITY MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,

vs.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky, . . Defendant in Error.

Motion and Petition for Re-Hearing.

F. W. JENKINS,
JULIEN T. DAVIES,
CHARLES S. GRUBBS,
WM. MARSHALL BULLITT.

Counsel for the
SECURITY MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

No. 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY . . . *Plaintiff in Error.*

vs. NOTICE.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY . . . *Defendant in Error.*

The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, is hereby notified that on Monday, April 2, 1906, the plaintiff in error, the Security Mutual Life Insurance Company, will, at the opening of the court on that day, submit a motion to file petition for rehearing and brief, and in connection therewith will file affidavit of Wm. Marshall Bullitt and letter from Henry R. Prewitt, Insurance Commissioner, and will ask that said letter and affidavit be read on the hearing of said petition.

March 29, 1906.

WM. MARSHALL BULLITT,
CHAS. S. GRUBBS,
Counsel for the Security
Mutual Life Insurance Company, Plaintiff in Error.

The foregoing notice is hereby accepted and the delivery to me of a copy of said motion, together with affidavit and letter named is acknowledged, this 29th day of March, 1906.

J. H. HAZELRIGG,
Counsel for Henry R. Prewitt,
Insurance Commissioner,
Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

No. 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY . . . *Plaintiff in Error.*

vs. MOTION.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY . . . *Defendant in Error.*

The plaintiff in error, the Security Mutual Life Insurance Company, moves the court for leave to file herein its petition for rehearing and brief, and as a part thereof, files affidavit of Wm. Marshall Bullitt and letter from Henry R. Prewitt, Insurance Commissioner, and asks that said affidavit and letter be read on the hearing of said petition.

WM. MARSHALL BULLITT,

CHAS. S. GRUBBS,

Attorneys for Security Mutual Life Insurance Company, Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1905.

No. 178.

SECURITY MUTUAL LIFE INSURANCE COMPANY . . . *Plaintiff in Error.*

vs. AFFIDAVIT.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY . . . *Defendant in Error.*

The affiant, Wm. Marshall Bullitt, says that he is a practicing lawyer, a member of the Jefferson county bar of Louisville, Kentucky, and having been of counsel for the

Security Mutual Life Insurance Company since the institution of the original action in the Jefferson Circuit Court, he is familiar with the several steps taken in the conduct of this case. The affiant says that the questions in issue herein being undetermined on July 1, 1905, and the parties desiring to preserve the status pending the appeal to this court, and the annual tax due to the State of Kentucky being paid, the Insurance Commissioner consented to, and did conditionally, renew the license for one year from July 1, 1905, as shown by letter of Henry R. Prewitt, Insurance Commissioner, dated March 23, 1906, to Grubbs & Grubbs, filed herewith and made part hereof, marked "A."

WM. MARSHALL BULLITT,

Subscribed and sworn to by Wm. Marshall Bullitt, before me this 29th day of March, 1906. My commission expires 6th day of February, 1910.

E. G. NORTON,
Notary Public Jefferson
County, Kentucky.

"A."

March 23, 1906.

Grubbs & Grubbs,
Louisville, Ky.:

Dear Sirs: Yours of the 22d inst., to Judge James H. Hazelrigg of this city, concerning the case of the Security Mutual Life Insurance Company against myself as Commissioner, was this day handed to me by Judge Hazelrigg, and in reply thereto will say that in renewing the license of the Security Mutual Life Insurance Company, I did so with the understanding that the new license should in no way affect the rights of the Commonwealth in the litigation pending between the Commonwealth and the company; I reserved all rights of the Commonwealth to cancel the license at any time. There was no record made at the time of renewing the license. Yours very truly,

HENRY R. PREWITT,
Insurance Commissioner.

NO. 178

In the Supreme Court of the United States

OCTOBER TERM, 1905.

SECURITY MUTUAL LIFE INSURANCE COMPANY, . Plaintiff in Error,

vs.

HENRY R. PREWITT, Insurance Commissioner of the State of Kentucky . . . . . Defendant in Error.

PETITION FOR RE-HEARING.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the Security Mutual Life Insurance Company, plaintiff in error, respectfully prays for an order directing a re-argument of this cause upon the following grounds:

First.—The absence of any argument whatever, either oral or in any of the briefs, by counsel for either party upon the point on which this court disposed of the case, due to a fai ure on counsel's part to anticipate that this court would either consider or decide the case upon a ground not raised by counsel.

Second.—The misconception by this court of the issues really involved in the litigation, and an erroneous view of the laws of Kentucky as to the admission of foreign insurance companies to do business within the State, a correct understanding of which demonstrates that the question involved has not become (as this court decided it had) a "moot question," but is still a matter of live and vital moment.

Third.—Because the license granted July 1, 1904, expiring July 1, 1905, was, on that date, in order to prevent injustice to the plaintiff in error renewed, not absolutely, but only conditionally, pending this appeal, for another year, as appears by the letter of the Commissioner of March 23, 1906.

Fourth.—The great practical importance of the decision upon the rights of the plaintiff in error, depriving it of the possibility of relying upon a right guaranteed to it by the Federal Constitution and subjecting it to a destruction of its business in the State of Kentucky without any prospect of relief, and all due not to any lack of diligence on its part, but to the delay of this court in setting the cause down for argument.

Fifth.—Because if the judgment of the Court of Appeals of Kentucky is erroneous, plaintiff in error is entitled to its costs.

Your petitioner respectfully requests an attentive consideration to the annexed brief, wherein the grounds above mentioned are more fully stated and supported, and prays that this cause may be set down for re-argument upon some day to be appointed by the court.

And so your petitioner will ever pray.

F. W. JENKINS,
JULIEN T. DAVIES,
CHAS. S. GRUBBS,
WM. MARSHALL BULLITT,
Counsel for Plaintiff in Error.

I certify that, in my opinion, the foregoing petition for rehearing is well founded.

WM. MARSHALL BULLITT,
Counsel for Plaintiff in Error.

BRIEF IN SUPPORT OF THE PETITION FOR REHEARING.

First Point.

THE ABSENCE OF ANY ARGUMENT WHATEVER, EITHER ORAL OR IN ANY OF THE BRIEFS, BY COUNSEL FOR EITHER PARTY UPON THE POINT ON WHICH THIS COURT DISPOSED OF THE CASE, DUE TO A FAILURE ON COUNSEL'S PART TO ANTICIPATE THAT THIS COURT WOULD CONSIDER OR DECIDE THE CASE UPON A GROUND NOT RAISED.

This court held that this was a suit to compel a restoration of a license; that the life of the license expired by its own terms pending the litigation, and that therefore there was nothing left to litigate about; that you could not compel the restoration of a thing which, by the lapse of time, had ceased to exist. That point was not in any way raised or discussed at the oral argument or in the briefs (for reasons which will be given hereafter), and the court in deciding the case on such a point was deprived of the views of counsel on the subject, and, as will be seen, not unnaturally fell into error as to what this litigation really embraced.

The point was not overlooked or intentionally ignored by counsel, but the counsel for both parties conceived that no such point really existed under the statutes of Kentucky. Should not this court be willing to afford an opportunity to hear counsel on so important a matter?

Second Point.

THE MISCONCEPTION BY THE COURT OF THE ISSUES REALLY INVOLVED IN THE LITIGATION AND AN ERRONEOUS VIEW OF THE LAWS OF KENTUCKY AS TO THE ADMISSION OF FOREIGN INSURANCE COMPANIES TO DO BUSINESS IN THE STATE, A CORRECT UNDERSTANDING OF WHICH DEMONSTRATES THAT THE QUESTION INVOLVED HAS NOT BECOME (AS THIS COURT DECIDED IT HAD) A "MOOT QUESTION," BUT IS STILL A MATTER OF LIVE AND VITAL MOMENT.

This court, in its opinion, said:

> "Section 635,* Kentucky Statutes, provides that these licenses or permits must be renewed *annually* . . . It appears that the laws of Kentucky require the *annual* renewal of the permit to any foreign insurance company, in order that the company may continue to do business in the State, and without such license the company is prohibited from doing any business therein. . . . If the court should now assume to cancel the revocation it could not thereby reinstate the permit, which has already expired and the company would still be without power to do business in the State until another permit should be granted. To adjudge that the old permit remains good until the expiration of the year is to adjudge an abstract question, as no relief can be now awarded concerning it."

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*Evidently a misprint for Sec. 633.

It is thus seen that the court disposes of the case upon the theory that the suit below was one to secure the restoration of the so-called annual license dated July 1, 1904, and that except as acting under such specific one-year license the insurance company had no authority to do business in the State.

That is a radical misconception of the laws of Kentucky on the subject.

The laws of Kentucky do not require the annual renewal of a license to a foreign insurance company in order that the company may continue to do business in the State, and there is no provision in the law for the issuance to a foreign insurance company of an annual permit nor for the renewal thereof; and this court, in holding to the contrary, was misled by the statute (section 633), which provides for the renewal of licenses to *agents* annually.

The law on the subject of the admission of foreign insurance companies is as follows:

It must file with the Insurance Commissioner a resolution consenting to the service of process upon an agent or upon the Commissioner of Insurance. (Ky. Stats., sec. 631); and it shall file with the Commissioner of Insurance a copy of its charter and be possessed of the legal reserve, and when those conditions have been complied with the law is mandatory that the Insurance Commissioner "shall furnish to such agents as the company directs, a license to transact business as agents for said company." (Ky. Stats., sec. 634.) These licenses to agents "must be renewed annually" upon a finding by the Commissioner that the company has complied with the law and has the required reserve (Ky. Stats., sec. 633). If the Insurance Commissioner finds that any foreign insurance company has failed to comply with the law, or is insolvent,

he shall revoke or suspend its authority to do business, and shall notify its agents of such suspension, and they in turn shall notify the policyholders. (Ky. Stats., sec. 753.) The Insurance Commissioner is also required to apply for an injunction restraining the company from further proceeding with its business, and the court may appoint a receiver "to take possession of the property and effects of the company and to settle its affairs." (Ky. Stats., sec. 753.)

It is thus seen that there is no express provision in the law for issuing an annual license to the company, but when it shall have been admitted into the State to transact business the authority to continue within its limits is a continuing one until revoked, and by the principle of "comity" it has the right to continue to do business in the State until expelled.

It is true that as a mere matter of practice the insurance department of the State has been in the habit on the first of July in each year of issuing a so-called certificate to foreign insurance companies, authorizing them to transact business in the State for one year, a copy of which will be found on page 3 of the record. There is no authority of law for the issuance of that certificate. It is superfluous and is a mere matter of administrative convenience. The Commissioner adopted it as his method of making an annual "finding," as required by Kentucky Statutes, section 633, as a condition precedent to the renewal of licenses to agents.

By Kentucky Statutes, section 4226, each insurance company is required, on July 1st of each year, to make a statement of the amounts of its premiums collected and to pay a tax of $2 upon each $100 thereof, and accordingly the certificate referred to is issued as a matter of convenience on that date as a receipt and as evidence that the

company has complied with the law, and it is not issued pursuant to any express or implied authority or requirement of the statutes.

We submit therefore that this court erred in holding that "the laws of Kentucky required the annual renewal of the permit to any foreign insurance company;" that "without such license the company is prohibited from doing business therein."

Indeed, a careful inspection of the petition for the injunction shows that the gist of the case was not to compel a restoration of the mere renewal certificate dated July 1, 1904; for while the certificate is copied into the bill, it is not referred to as the basis or authority of the company to do business, but, on the contrary, the theory of the bill is, that when the insurance company was permitted to enter the State it was entitled to remain there and to continue to transact its business until it was expelled by some affirmative action. Its right to do business did not expire with the expiration of the year for which the so-called certificate was granted. The certificate which is issued each year by the Commissioner is only evidence of the fact that the company had at the time stated complied with all the laws of the State, and can not in any manner add to or take from the authority theretofore exercised by the company to continue to do business indefinitely.

In so far as the certificate is set out in the petition it is a mere formality and is not referred to anywhere else except in that one place, and the action of the Commissioner is not stated to have been a revocation of that certificate or license, but the bill alleges that the Commissioner "revoked the authority of the Security Mutual to do business in the State of Kentucky," which refers not to the mere yearly permit, but to the prior authority which the com-

pany had to do business in the State ever since the year 1900, when it was first admitted.

Kentucky Statutes, sections 572 and 631, are both anti-removal statutes, and are both set out in the petition (Rec. 4). They contemplate an indefinite continuance of business in the State and an absolute revocation of authority upon removal; and when a company has removed a suit, its right to do business in the State is absolutely forfeited, and there is no provision for again admitting it into the State.

In Barron v. Burnside and in Doyle v. Insurance Company, there were provisions in the State statutes for allowing the company to come back into the State after a certain period subsequent to the removal, but in the Kentucky Statutes there is no provision for ever allowing a company to again re-enter the State.

There is another aspect which shows that the questions are not mere abstract questions:

By virtue of the revocation of the license the Insurance Commissioner became entitled, under Kentucky Statutes, section 753, to enjoin the company from further transacting business in the State and to obtain a receiver for all its property and effects in the State and to settle up its affairs.

The bill for an injunction was not only to set aside the revocation, but also to restrain the Insurance Commissioner from enjoining the company from transacting business and from obtaining a receiver of its property and effects. The right of the Insurance Commissioner to obtain a receiver for the property and effects of the company did not expire with the life of the permit, and therefore if this court's opinion shall stand we have the anomalous condition of affairs that the rights of the company have expired so that it can obtain no adjudication from this

court; and yet the questions involved are alive enough to enable the Insurance Commissioner to obtain a receiver for the company. The right of the Insurance Commissioner to a receivership of the company exists only by virtue of the validity of his revocation of its right to do business in the State, and upon the dismissal of this writ of error the Insurance Commissioner is free to have a receiver appointed for the company. That shows that the questions involved in this proceeding are not mere abstract questions, but in that aspect at least are still alive.

Suppose when the mandate of this court is sent down and the supersedeas ceases to be effective, that the Insurance Commissioner should then proceed to ask for a receiver upon the ground that this company's license had been revoked in September, 1904. What defense could the insurance company interpose? It undertook to enjoin him from doing that thing upon the ground that he was infringing a constitutional right. The Court of Appeals of Kentucky has decided that he did not infringe any constitutional right, and the supreme court has dismissed the writ of error on the ground that the question involved was merely an abstract one, and yet, when the case comes back to the State court, it will be perfectly free to grant all the relief that the Insurance Commissioner wants.

We respectfully submit that this court has overlooked one of the most important features involved in this litigation, and it was on account of the full appreciation by counsel for both sides that a mere annual permit was not the basis of the authority of the company to do business in the State that the question was not raised on the oral argument or in the briefs.

Third Point.

BECAUSE THE LICENSE GRANTED JULY 1, 1904, EXPIRING JULY 1, 1905, WAS, ON THAT DATE, IN ORDER TO PREVENT INJUSTICE TO PLAINTIFF IN ERROR, RENEWED, NOT ABSOLUTELY, BUT CONDITIONALLY, PENDING THIS APPEAL, FOR ANOTHER YEAR, AS APPEARS BY THE LETTER OF THE COMMISSIONER OF MARCH 23, 1906.

When the trial court (Gordon, J.) entered the judgment on October 29, 1904, directing the insurance commissioner to cancel his revocation and to grant authority to the plaintiff and its agents to transact the business of life insurance in the State of Kentucky (Rec. 12), the Commissioner obeyed the order of the court and restored to the plaintiff its authority to do business in the State.

On December 5, 1904, the Court of Appeals reversed the judgment of the trial court, but the writ of error sued out from this court operated as a supersedeas and so the matter remained in *statu quo* pending the hearing of the case here.

On July 1, 1905, the company paid its annual tax and it was also necessary for the agents to renew their licenses under Kentucky Statutes, section 633. Inasmuch as the right of the Security Mutual to do business in the State of Kentucky was not based upon the so-called annual permit, the Insurance Commissioner recognized that, if Kentucky Statutes, section 633, was unconstitutional and did not authorize his revocation of its right to do business in the State, it would be a great injustice to hamper the company by refusing to renew the so-called annual permit or by refusing to renew the annual licenses to the agents.

The Insurance Commissioner, in a spirit of fairness which characterizes his whole action in this proceeding, did not wish to destroy the company's business by assuming that its right to do business in the State depended upon the annual renewal of the licenses and thereby escape the operation of the supersedeas by making the technical claim that the renewal of the license did not come within the prohibition of the supersedeas and therefore, on July 1, 1905, in order that the status of all parties might be preserved upon the payment by the company of its annual tax, he renewed the license until July 1, 1906.

The letter of the Commissioner shows that the renewal is conditioned on the action of this court, and that we will be turned out of the State without a decision on the merits of the claim.

We submit a renewal made under such circumstances is a renewed threat of a revocation of the license and of all authority to do business in the State if this writ of error should be dismissed.

While courts decline to decide moot or abstract questions, nevertheless they encourage any action on the part of litigants in real controversies that facilitates the administration of justice (Lord v. Veazie, 8 Howard, 252), and it is in this spirit that the Commissioner issued his renewal conditionally.

Facts which affect the right of the court to proceed or which show that a question has become abstract may be proven by extrinsic evidence. Dakota Co. v. Glidden, 113 U. S., 225, 226; Mills v. Green, 159 U. S., 654; Kimball v. Kimball, 174 U. S., 162; Jones v. Montague, 194 U. S., 147, 153.

The principle which allows the expiration of jurisdiction to be proved dehors the record will permit evidence contradicting an inference that a question is "moot" and therefore we file the affidavit containing the Commissioner's letter.

Fourth Point.

THE GREAT PRACTICAL IMPORTANCE OF THE DECISION UPON THE RIGHTS OF THE PLAINTIFF IN ERROR, DEPRIVING IT OF THE POSSIBILITY OF RELYING UPON A RIGHT GUARANTEED TO IT BY THE FEDERAL CONSTITUTION AND SUBJECTING IT TO A DESTRUCTION OF ITS BUSINESS IN THE STATE OF KENTUCKY, WITHOUT ANY PROSPECT OF RELIEF, AND ALL DUE NOT TO ANY LACK OF DILIGENCE ON ITS PART, BUT TO THE DELAY OF THIS COURT.

A court, especially the Supreme Court of the United States, we take it for granted, is reluctant to refuse to decide a case before it when the question involved is the important claim of the protection of a constitutional provision; and when a litigant specially sets up and claims in a State court some right, privilege or immunity under the Federal Constitution and that right, privilege and immunity is there denied. This Honorable Court, unless the law imperatively demands it, will necessarily hesitate to so dispose of a case so as forever to deprive the litigant of the opportunity to have its right under the Constitution judicially passed upon by the court specially created for that purpose.

The practical effect of this court's decision is this: The Insurance Commissioner did not merely cancel the so-called and superfluous yearly license which this court alleges to have expired on July 1, 1905, but he also "revoked all authority of the Security Mutual" to do business in the State, such revocation being for all *future* time. By the dismissal of this writ of error, the judgment of the State court dis-

missing the bill for an injunction becomes *res judicata;* the seal of approval is placed on the Insurance Commissioner's action in revoking the authority to do business; he is free now to notify all policyholders of such revocation; and he may enjoin the company from further transaction of its business and secure a receiver for its property and effects in this State (Ky. Stats., sec. 753), and all because it removed a case to the federal courts.

This writ of error was filed January 27, 1905; the record was filed in this court February 13, 1905; it was printed at once; a motion to advance, as authorized by statute (U. S. Rev. Statutes, sec. 949), was made in March, 1905, and was denied in April, 1905. In short, the plaintiff in error did all in its power to secure a decision by this court before the expiration of the license, and if the case had then been advanced (as it subsequently was), a decision could have been had before July 1, 1905. Should a litigant be deprived of the opinion of this court on a great question of constitutional right because this court declines to consider the case until it is too late to decide it, and then assigns such delay as a ground for dismissing the writ? If the present opinion be adhered to it would be impossible ever to get the question decided, for no matter how promptly a case were heard below, this court might never decide it before the year expired.

The plaintiff in error, for having removed a case to the federal court, is not only deprived of relief in this court, but its business will be destroyed, and it is at the mercy of the Insurance Commissioner, and all because it exercised a right conferred by the Federal Constitution.

The question raised by this writ of error is therefore not an abstract one at all; the gravest practical results will follow from it, and we respectfully submit that a re-argument should be ordered so as not to foreclose a question on which counsel have not been heard.

Fifth Point.

BECAUSE IF THE JUDGMENT OF THE COURT OF APPEALS OF KENTUCKY IS REVERSED, PLAINTIFF IN ERROR IS ENTITLED TO ITS COSTS.

Aside from the results which may come to plaintiff in error as suggested above, the practical effect of the opinion herein is to put upon plaintiff the costs, at least, in the courts below (Kentucky Statutes, 889). While this court has entire control of costs as well as the merits (Florida Internal Improvement Fund v. Greenough, 105 U. S., 527), ordinarily costs will not be considered in such cases, but in Pennsylvania v. Wheeling and Belmont Bridge Company, 18 Howard, 396 (cited in Mills v. Greene), the court awarded costs to the party who was adjudged to be correct on the main question, where an intervening act had made it impracticable to grant the relief sought in the original bill.

While appreciating the importance of the questions constantly pressing upon this court, we respectfully submit that, as the rule on which this case was decided is not of universal application, if correct in its main contention, the plaintiff in error should not, under the facts shown by this record, be subjected even to the costs.

We respectfully ask a rehearing.

F. W. JENKINS,
JULIEN T. DAVIES,
CHARLES S. GRUBBS,
WM. MARSHALL BULLITT,
Counsel for Security Mutual Life Ins. Co.,
Plaintiff in Error.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. ~~550.~~ 178

Office Supreme Court U. S.
FILED
MAR 24 1905
JAMES H. McKENNEY,
Clerk.

SECURITY MUTUAL LIFE INSURANCE COMPANY OF BINGHAMTON, NEW YORK, ... *Plaintiff in Error,*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, . . . *Defendant in Error.*

MOTION TO ADVANCE.

The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, moves the court to advance this case for hearing on the docket.

BRIEF STATEMENT OF FACTS.

The plaintiff in error is a foreign life insurance company, doing business in Kentucky under a license issued by the Insurance Commissioner. Upon being sued in a State court, the company removed the case to the Federal court on the ground of a diversity of citizenship.

Thereupon the commissioner canceled the license, when the company brought this action in the State court—Jefferson Circuit—to compel the insurance commissioner to restore its license, and the lower court granted the relief upon the ground that the Kentucky

statute directing such cancellation was void, as in conflict with the Federal Constitution. The Court of Appeals of Kentucky reversed the lower court, and directed that the petition be dismissed.

The reasons inducing the defendant in error to ask that the case—which is now being prosecuted by writ of error in this court—be advanced for an early decision are: That an orderly and proper administration of the office of Insurance Commissioner of the State is of momentous importance to the entire public, and the people generally in the State, as well as important to numerous insurance companies doing business in the State.

According to reports in the insurance bureau, there are in Kentucky some 385,000 life insurance policies, insuring something like $215,000,000.00. The business of the foreign fire insurance companies is also quite large, and the legal issues presented in the case involve all foreign insurance companies of every kind.

LEGAL QUESTIONS.

The contention of the plaintiff in error, as shown by its petition below, is that the Kentucky statute (Section 631), which requires the cancellation of the license of any foreign insurance company on its removal of a suit against it to a Federal court, and under authority of which the Insurance Commissioner canceled its license,

is repugnant to the Constitution of the United States, and the laws made in pursuance thereof, wherein the plaintiff in error was entitled to such removal under conditions existing in the case; and that a forfeiture of its license to do business in the State could not be made to depend on the exercise of this undoubted right of removal.

The defendant in error, admitting, of course, that the State is powerless to prevent such removal, contends, nevertheless, that the Kentucky statute providing for such cancellation of license is a valid exercise of the power of the State to exclude foreign insurance companies for any reason whatever.

Whether or not the exercise of such power is permissible under Federal law, is the sole question involved. He is advised that the plaintiff in error will unite in this motion.

Wherefore, he respectfully prays that this case be assigned to as early a day upon the docket as may be practicable.

J. H. HAZELRIGG,
Counsel for Defendant in Error.

The plaintiff in error, Security Mutual Life Insurance Company, concurs in the request and motion of the defendant in error to advance this case.

WILLIAM MARSHALL BULLITT,
Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 530.

SECURITY MUTUAL LIFE INSURANCE COMPANY, ... *Plaintiff in Error,*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, . . . *Defendant in Error.*

NOTICE.

Notice is hereby given that Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, defendant in error in the above styled cause, will, on Monday, the 3rd day of April, 1905, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington, D. C.

J. H. HAZELRIGG,

Counsel for Henry R. Prewitt, Insurance Commissioner for the State of Kentucky.

The foregoing notice is hereby accepted and a copy of the motion is hereby acknowledged, this 20th day of March, 1905.

SECURITY MUTUAL LIFE INS. CO.,

By WILLIAM MARSHALL BULLITT,

Counsel.

Office Supreme Court U. S.
FILED
OCT 16 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 178

SECURITY MUTUAL LIFE INSURANCE COMPANY OF BINGHAMTON, NEW YORK, *Plaintiff in Error.*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, *Defendant in Error.*

MOTION TO ADVANCE.

The defendant in error, Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, moves the court to advance this case for hearing on the docket.

BRIEF STATEMENT OF FACTS.

A motion to advance this case was made late in the last term (April, 1905), and was denied "*without prejudice.*" Accordingly, it is now renewed.

The plaintiff in error is a foreign life insurance company, doing business in Kentucky under a license issued by the Insurance Commissioner (Record, 2, 3). Upon being sued in a State court, the company removed the case to the Federal court on the ground of a diversity of citizenship (R., 3).

Thereupon the Commissioner canceled the license (R., 4); and the company brought this action in the State court

—Jefferson Circuit—to compel the Insurance Commissioner to restore its license, and the lower court granted the relief upon the ground that the Kentucky statute directing such cancellation was void, as in conflict with the Federal Constitution (R., 8-12). The Court of Appeals of Kentucky reversed the lower court, and directed that the petition be dismissed (R., 14).

The reasons inducing the Insurance Commissioner, defendant in error, to ask that the case—which is now being prosecuted by writ of error in this court—be advanced for an early decision are: That an orderly and proper administration of the office of Insurance Commissioner of the State is of momentous importance to the entire public, and the people generally in the State, as well as important to numerous insurance companies doing business in the State.

According to reports in the insurance bureau, there are in Kentucky some 385,000 life insurance policies, insuring something like $215,000,000.00. The business of the foreign fire insurance companies is also quite large, and the legal issues presented in the case involve all foreign insurance companies of every kind; and under the statute and the decision herein of the highest court in Kentucky, it is the duty of the defendant in error to immediately revoke the license of every insurance company in the State that removes a case to the Federal court.

LEGAL QUESTIONS.

The contention of the plaintiff in error, as shown by its petition below, is that the Kentucky statute (Section 631), which requires the cancellation of the license of any foreign insurance company on its removal of a suit against it to a

Federal court, and under authority of which the Insurance Commissioner canceled its license, is repugnant to the Constitution of the United States, and the laws made in pursuance thereof, wherein the plaintiff in error was entitled to such removal under conditions existing in the case; and that a forfeiture of its license to do business in the State could not be made to depend on the exercise of this undoubted right of removal.

The defendant in error, admitting, of course, that the State is powerless to prevent such removal, contends, nevertheless, that the Kentucky statute providing for such cancellation of license is a valid exercise of the power of the State to exclude foreign insurance companies for any reason whatever.

Whether or not the exercise of such power is permissible under Federal law, is the sole question involved. He is advised that the plaintiff in error will unite in this motion.

Wherefore, he respectfully prays that this case be advanced and assigned for oral argument to as early a day upon the docket as may be practicable.

J. H. HAZELRIGG,

Counsel for Defendant in Error.

The plaintiff in error, Security Mutual Life Insurance Company, concurs in the request and motion of the defendant in error to advance this case.

WILLIAM MARSHALL BULLITT,

Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 178

SECURITY MUTUAL LIFE INSURANCE COMPANY - - - - - - - - - *Plaintiff in Error.*

vs.

HENRY R. PREWITT, INSURANCE COMMISSIONER OF THE STATE OF KENTUCKY, *Defendant in Error.*

NOTICE.

Notice is hereby given that Henry R. Prewitt, Insurance Commissioner of the State of Kentucky, defendant in error in the above styled cause, will, on Monday, the 16th day of October, 1905, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington, D. C.

J. H. HAZELRIGG,

Counsel for Henry R. Prewitt, Insurance Commissioner for the State of Kentucky.

The foregoing notice is hereby accepted and a copy of the motion is hereby acknowledged, this 21st day of September, 1905.

SECURITY MUTUAL LIFE INS. CO.,

By WILLIAM MARSHALL BULLITT,

Counsel.

DEFENDANT'S BRIEF

FILE COPY.

Office Supreme Court U. S.
FILED
DEC 29 1905
JAMES H. McKENNEY,
Clerk.

No. 178.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905

THE SECURITY MUTUAL LIFE INSURANCE COMPANY, - *Plaintiff in Error,*

VERSUS

H. R. PREWITT, Commissioner - *Defendant in Error.*

BRIEF FOR PREWITT, COMMISSIONER.

J. H. HAZELRIGG.
Counsel.

N. B. HAYS, Attorney-General,
H. R. PREWITT,
HAZELRIGG & HAZELRIGG,
Of Counsel.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE SECURITY MUTUAL LIFE INS. CO., - - *Plaintiff in Error,*

vs. **No. 178.**

H. R. PREWITT, Commissioner, - - - - - - *Defendant in Error.*

BRIEF FOR PREWITT, COMMISSIONER.

THE FACTS.

In an action in the Owen Circuit Court by Crain & Gayle against the Security Mutual Insurance Company, a foreign corporation, the company, on the ground of diverse citizenship, filed its petition and removed the case to the United States Circuit Court. Thereupon Prewitt, State Commissioner, the present defendant in error, revoked the license of the company to do business in this State. Thereupon, this action was brought by petition in equity against him, to enjoin him from effectuating the revocation by publishing same as the law required him to do, and in effect to compel him to set aside the order of revocation.

The case was heard in the Jefferson Circuit Court on demurrer, and the judgment was for the plaintiff.

An appeal was prosecuted by the Commissioner, and the Court of Appeals of Kentucky reversed the judgment and directed a dismissal of the petition. Thereupon, this writ of error was sued out.

THE QUESTION INVOLVED.

The statute under which the Commissioner acted is as follows:

> "**Sec. 631. Foreign Corporations—Process—Action—Removal to or Institution in Federal Court Forbidden.** Before authority is granted to any foreign insurance company to do business in this State, it must file with the Commissioner a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Commissioner it shall be his duty at once to send it by mail addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Commissioner to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State."

This statute, says the company, is unconstitutional and void in that it seeks to deprive it of a right guaranteed to it by Federal law to take its cases to the Federal courts, and no action or contemplated action of the Commissioner based on such statute can be upheld.

The Commissioner insists that the constitutionality of no law, State or Federal, is involved. He admits that the statute is powerless to prevent such removal, but insists that the State may revoke or cancel its permit for any

reason whatever, and that injunction will not lie to prevent the State acting by its Commissioner from withdrawing such permit to the company to transact business in the State, whenever it pleases and for whatever reason it may suggest; or even without any reason, so long as it stops short of *depriving* the company of any right guaranteed to it under the Constitution. That should the Commissioner refuse to revoke as is made his duty to do under the statute, he himself could be compelled to do so by mandamus.

Perhaps we can state our position no more clearly than is stated by the learned author of the article on "Foreign Corporations" in 13 A. & E. Ency. of Law (2nd ed.), 867. He says:

> "In a number of States statutes have been enacted making the right of foreign corporations to do business in such States conditional on their agreement not to remove suits in which they are parties from the State to the Federal courts. These statutes have been almost uniformly declared unconstitutional and void, on the ground that every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all those courts may afford him and agreements in advance to oust the courts of jurisdiction conferred by law are illegal and void.
>
> "Notwithstanding the invalidity of these statutes, a cancellation and revocation of a foreign company's license and authority to do business in the State for a breach of such an agreement is *a valid exercise of the power of the State to exclude foreign corporations for any reason whatever.*"

It may be worth while to say here that our contention is not that the *Commissioner* may arbitrarily refuse a license or arbitrarily revoke one, when the company has complied with all the requirements of the law.

No such question is involved. When the company has exercised its undoubted right to remove its case, then the statutes make it the imperative duty of the Commissioner to revoke, and this power, we contend, the State undoubtedly possesses.

SYNOPSIS OF THE ARGUMENT.

The Insurance Commissioner is the officer charged with the duty of issuing licenses or permits to foreign insurance companies to do business in Kentucky, and he it is who is charged with the duty of revoking such licenses, in some instances exercising his discretion, and in other instances controlled by positive statutory enactment.

We are dealing with the latter class. Here the ground for which the Commissioner is to withdraw the license is fixed by the statute (631 Ky. Statutes). That ground is founded, if we may conjecture as to the reasons which may have controlled the law-makers, on the supposed inconvenience to which the citizens might be subjected should the company remove its cases away from the vicinage of the transaction out of which such cases usually grow to a remote locality. But whatever may have been the reasons which controlled the legislature, it is the contention of the Commissioner that neither he nor the companies can question or inquire into these reasons, or ask the courts to do so.

The foreign company may of course take its case into the Federal court. That is its constitutional right. The State must and does recognize this right in the statute we are considering. Nevertheless, when the removal is made, the State, in the exercise of its right to let in, or not let in, foreign companies, its right to license or not to license

them to do business within its borders, may properly impose the duty on the Commissioner of withdrawing the license. This is in accordance with the universal rule *that a licensor at his pleasure may, with or without a reason, withdraw a license granted by him*, and is further within the conceded power of the State to exclude the company in the first instance.

The Federal Constitution nowhere attempts to direct the State as to when or why it may permit a foreign company to do business within its limits, or remain after it gets there, or as to when or why it may refuse to let in the foreign company—except, of course, when the company's business is of a Federal nature. Nor does that Constitution direct when or why the State may withdraw its license issued to a foreign insurance company to do business in its borders.

When examined carefully the contention of the respective parties hereto are separated by an exceedingly narrow margin. Thus after a full review of the authorities, opposing counsel conclude (page 11 of their brief) that:

> (1) "A State may, by a valid affirmative expression, prohibit the entrance of, or expel, all foreign corporations which are not engaged in interstate commerce, or in performing a Federal function."

(Citing Paul vs. Virginia, 8 Wall., Horn Silver Mining Co. vs. New York, 143 U. S. 305.)

And further (Pg. 12), that:

> "A State may prescribe the terms or conditions upon which a foreign corporation (except those indicated) will be admitted to carry on their business."

(Citing Cooper Mfg. Co. vs. Ferguson, 113 U. S. 727; Horn Silver Mining Co. vs. New York, 143 U. S. 305; Hooper vs. California, 155 U. S. 648; Waters-Pierce Oil Co. vs. Cravens, 178 U. S. 389.)

> (4) Those terms or conditions must not be inconsistent with, or repugnant to, the Constitution and laws of the United States.

To relieve themselves from the force of their first proposition, counsel then assume the position that the State has not by valid affirmative expression expelled the plaintiff in error from the State, and to escape the force of the second, they say that the statute imposing the duty on the Commissioner of revoking the license whenever the company has removed an action against it, is the imposition of "Terms and Conditions" which are inconsistent with the Constitution and laws of the United States.

II.

Has the State by any valid affirmative expression expelled the company from its territory? To understand counsel's contention here, we take the liberty of referring further to their argument, wherein they say that:

> "The mere naked exclusion or the revocation of the license of an insurance company is an act within the power of the State, and the reasons therefor are immaterial, but it is to be remembered that we are only considering the single question of power to exclude or revoke—for that is all the power we concede the State has over a foreign corporation, to-wit, a simple statute in such terms as this:
>
> "'The Security Mutual is hereby prohibited from entering Kentucky; or the license of the Security Mutual is hereby revoked.'" (Page 48 of counsel's brief.)

In view of counsel's concession that when the mere naked revocation of a license is involved, the terms given by the State for the revocation are "immaterial"—and this is, of course, well settled law—we amend counsel's suggested act, thus:

> "The license of the Security Mutual is hereby revoked for the reason that the company has removed an action against it to a Federal court."

Our contention is, that the State has in substance done this very act. The State through its legislative department has prescribed and defined the duties of one of its chief officers. The duty involved is the revocation of a license on the happening of a certain event—that certain event is one which the State confessedly could by a valid "affirmative expression" have used as a reason or basis for expelling all foreign corporations from its borders. The act of the officer in performing this duty under the direction of the statute is the act of the State itself, made effective and operative after the cause arises which the State thought sufficient for the revocation. The legislative act—though dependent on a future event for its development and execution, is the law from the moment of its adoption. Its execution and operation is made to depend on contingencies, as many laws are. Therefore, the revocation by Prewitt on September 29, 1904, of the license here involved, for reasons which the State had the right to announce, is a valid "affirmative expression" expelling the company from the State, and is in effect a mere naked exclusion or revocation, and the statute is in as "simple" a form as the one formulated by learned counsel, as being a valid one.

The contention, of course, is that the State must wait until each recurring act has been done by a foreign company, which in the judgment of the law-makers would justify an expulsion, and that it can not devolve in advance the duty on its officers of doing what it would do, and confessedly had the right to do, under the same circumstances. And this theory counsel evolve out of the doctrine that *parties can not in advance agree to oust courts of their jurisdiction.* As no agreement of any kind on the part of anybody, at any time or place, is involved, we are not able to appreciate the force of the argument. The argument comes to this, that the State can expel for removal to the Federal courts if it does not get the reason *in advance.*

We can not see why a State may not put the causes or reasons which will induce a revocation by its officer, and therefore by itself, on its records—its statute books—as well before the fact which will result in the revocation as after the fact so resulting. In neither case can the reasons for the State's action be material, nor can these reasons be inquired into. And as we have seen, it is really in substance an action by the State operating effectively for the first time as to any particular act of removal, and subsequently to the act of removal, although the State is acting through its officer, who is likewise acting after the act of removal.

While the legislature can not delegate its power to enact laws to its officers, yet it may provide that whether or not a law enacted by it shall be operative shall depend, say on the popular will; and why may not the State on the same principle devolve the duty of putting the law into force—that is, of declaring a license forfeited—for any

reason which the legislature shall deem proper to put in statutory form, and which reasons for such enactment the legislature itself confessedly and without question could give, if acting directly on the subject after the act of removal?

In connection with this conceded right of the State to revoke the license of the foreign company by the action of its law-makers after each recurring act of removal for any reason it might see fit to give, or without any reason, it may be worth while to note that the stress put on the alleged fact that the statutory provision making it the duty of the Commissioner to revoke a license when the company removes its case, inflicts a penalty on the company, loses its entire force. For surely the affirmative or direct exercise by the State of the right of revocation after the company's removal of its case, without statutory warning to it, would be no more a penalty and no more harmful to it than where the State gives the warning to the company, in the statute, that if it removed its case, it must also move its business. The company at least is then put on its guard, and may come into the State and do business in the courts as the State provides, or it may keep out and avoid the penalty.

The State fixes in advance that the company is to renew annually its license. When renewed by the Commissioner, it is the State renewing it, not the Commissioner. It might just as well say that after renewing for five years for any company, the Commissioner should thereafter refuse to renew longer, and it might give no reason for this; or it might give as a reason that one company by that time had probably incurred as much obligation to the public as was safe, or any other reason—good

or bad—the Commissioner does as directed—it is the State doing it. So the State revokes the license in the case at bar, and its reasons or grounds for so doing are as immaterial as if the State, after the removal, had by its legislative department enacted the law suggested by counsel.

If, therefore, the test of the constitutionality of the law under consideration be that it visits the penalty of forfeiture of right on the company for doing what is its constitutional right to do, a point much pressed in the argument of counsel, then that test must render unconstitutional and void the act of the legislature in affirmatively expressing its will to revoke after each recurring act of the offending company. But as it is admitted the test is unsound in the one case, so it must be admitted to be unsound in the other. The fact is, that the vital and *missing* feature in either case, is that in neither event is there a *requirement* that the foreign company shall surrender any right guaranteed to it under the Constitution or the Federal statutes. Inconvenience and annoyance may result in not exercising the right to remove, or in the moving from the State if the case be removed; but neither inconvenience nor annoyance has ever been held in any court anywhere to overcome the will of the sovereign State. If so, then a showing that inconvenience and annoyance in being kept out or that even large pecuniary profit would come to such companies as were desiring to enter the State, but which they are not allowed to do for some supposed captious and arbitrary law of the State, would be sufficient excuse to override the will of the State and force their admission upon an unwilling public. The test is admittedly on all hands repugnant to the Consti-

tution, not annoyance and inconvenience to a corporation whose sole right in the State depends on the State's consent.

Repugnancy does exist whenever the State requires the company to agree in advance not to remove,—such an agreement is void, and is so treated in all the cases. In the present law there is no repugnancy because there is no agreement—no stipulation—for a surrender of any right.

The surrender of constitutional right which will create a repugnancy between the alleged offending law and the Constitution, of which the books speak, is an enforced surrender of such right by an agreement or stipulation made in advance, as a condition precedent to admission to a State. And no case anywhere has gone further than this. An enactment by the legislature of Kentucky, reciting that:

> "Whereas the Security Mutual Ins. Co. has, in violation of the warning given all such companies, removed a case to the Federal courts when sued by a citizen in the courts of this State, therefore, and for this sole reason, the license of said company to longer do business in this State is hereby revoked,"

Would admittedly be valid, and yet it is every whit as repugnant to the Constitution as the present law is claimed to be. It would inflict the same alleged penalty, and impose the same burden on the right to remove its case. It would be repugnant to the Constitution and laws of Congress in precisely the same sense as the present law is alleged to be repugnant. In neither case, however, would the State or its laws have deprived the company of any right to remove, which is the only Federal right it

had; but in each case the company would be deprived of the *right to do business longer in Kentucky*, a right which the wildest imagination has never set up as a *Federal right*. What right, therefore, is it which is guaranteed to the complaining company under Federal law, of which it is deprived? Certainly not the right to remand its case, for it has already remanded it. Not the right to stay in Kentucky, because no such *right* is guaranteed under Federal law.

III.

In discussing the first general proposition submitted in argument by the plaintiff in error, namely, that it would be a valid exercise of its power if the State would, after each recurring removal of their cases by foreign companies, enact a law revoking their respective licenses, we have already entrenched largely on the second point made by learned counsel, namely, that Kentucky Statutes, Sec. 631, providing for a revocation of licenses in the event a foreign insurance company removes a case to the Federal court, is repugnant to the Federal Constitution, because, "it imposes a burden on a right guaranteed thereunder, and makes the continuance within the State dependent upon the surrender or abandonment of, or abstention from, the right of removal to the Federal courts."

We have attempted to show that the law set forth in Section 631, making it the duty of the Commissioner to revoke the license, as in this case, was as much the act of the State, made effective after the removal, as was the admittedly valid act of the State in the supposed enactment suggested by counsel, and therefore that the section

was valid on the very ground maintained and admitted by counsel; and that neither the section under consideration nor the proposed enactment deprived the insurance company of any constitutional right. Without repeating the argument, because the entire range of the subject can more fully be treated under a discussion of the authorities to be noted presently, it is to be observed that the most that can be said against this section is, not that it deprives the company of any right, but that it probably "deters removals to the Federal court." So that the question in its last analysis comes to this:

Is it contrary to the Constitution and the laws of the United States that one who is entitled thereunder to remove a case to the Federal courts is left free to do so, but in the event he does remove, he must forfeit a privilege held at the will of the State? It seems to us to ask this question is to answer it.

It is argued that as Congress has the exclusive right to repudiate the removal of causes, the conditions of removal can not be added to by the State, or additional burdens imposed. An illustration of this, say counsel, would be the imposition by the State of a fine of $10.00 on every removal to the Federal court. We think the answer to this suggestion lies in this:

The permit is the State's stamp of approval on the company, and it is one thing to demand a surrender of this permit because of the company's business methods, or other reasons, and quite another thing to impose a fine on the company for doing what it has the constitutional right to do. The one is within, the other without, the power of the State.

Moreover, the State is as sovereign, or is as absolute in its right to *expel the company* by revoking a license granted to it by the State, without its reasons for such expulsion being inquired into, as Congress is in its right to regulate removals. It is a case of two sovereigns providing each in its own way for matters *within their respective powers*, and incidental results do not affect the exercise of these powers.

The State, acting within its conceded power, may expel the foreign company—no, say counsel, not if it gives as a reason for its acting, the fact of removal by the company; very well, says the State, "I will simply expel, and you can not question my reason for so doing."

Congress has no power to control the State, as to the revocation of licenses granted to it to foreign companies, and it would be a limitation on the State's power of revocation if, when about to exercise it, Congress should call on the State for its reason. It is trifling with the question to say that the State may expel without giving a reason, and yet if it happens to give one, the power can not be exercised. The bottom of the matter is, that you can not look into the reason at all for the State's action. If the State may expel without a reason, is its power to expel destroyed, if it gives a bad reason? The *reason* the State happens to give in this case is not the *burden* of which complaint is made, it is the *expulsion* itself which is the burden, and which causes the company's loss of continued business in the State. The whole complaint is of the *revocation*, and the thing that *hurts* is the *revocation*.

Therefore the inconvenience to the company, its loss of prospective business, and its burden of moving from the State, are caused by, and are attributable solely to, the

act of expulsion, and the "why" of it is not a matter of inquiry.

IV.

Hastening on to the point of considering the authorities, we yet desire to note briefly that it is a well-settled principle that in the absence of a valid State law preventing the foreign company's admission to the State, or of a valid license law required before doing business, the company may as freely enter and do business as if it were an individual.

This principle is aptly asserted by opposing counsel (pages 11 and 12 of their Brief) thus:

> 2." Until a State has decided otherwise by some valid affirmative direct enactment to the contrary, a foreign corporation has the right, by virtue of the common law rule of 'Comity' to enter any State and transact its business." (Citing 13 Am. & Eng. Ency. Law, 838-839; Cowell vs. Springs Co., 100 U. S. 555-59; Christian Union vs. Yount, 101 U. S. 352-356.)

It is to be noted that the law requiring the license must be a valid law,—it must not, of course, contravene any right guaranteed to the applicant for the permit under the Constitution and laws of the United States. Thus the proposed license law must not require the applicant to agree or stipulate that he will not remove cause to the Federal courts. Such a requirement is not only obnoxious to the Federal law giving him a right to remove his cause, but is as void as an attempt to oust courts of their jurisdiction. If such an agreement or stipulation is exacted by a State law, a foreign company may make the stipulation, yet move its cause to a Federal court, and will be

treated necessarily in its conduct of its business after such removal precisely as if no law had been enacted by the State requiring a license. This is the necessary consequence of the principle announced.

However, the applicant may ignore the law requiring the vicious agreement, go into the State in spite of it, and he can not be prosecuted for doing business without a license, simply because there is no valid law—therefore no law—preventing his admission to the State or requiring a license. These principles are harmoniously established by the three cases chiefly in point on this appeal, namely:

Home Insurance Co. vs. Morse, 20 Wall. 445;
Doyle vs. Continental Ins. Co., 94 U. S. 535;
Barron vs. Burnside, 121 U. S. 186.

THE AUTHORITIES.

On the general proposition that the admission into a State and the continued conduct therein of the business of a foreign corporation (save of certain ones not involved here) depend solely on the consent of the State, the citation of authority is hardly necessary. The principle is frankly conceded by opposing counsel, as we understand their argument.

The question herein is set at rest by the cases of

Paul vs. Virginia, 8 Wall. 168;
Horn Silver Mining Co. vs. New York, 143 U. S. 305;
Hooper vs. California, 155 U. S. 650, and many others.

In the latter case it is said:

> "The principle that the right of a foreign corporation to engage in business within a State, other than that of its creation, depends solely upon the will of such other State, has long been settled, and many phases of its application have been illustrated by this court."

(Citing Citizens Bank of Augusta vs. Earle, 38 U. S. 519, and a score of other cases) and the court continuing said:

> "Whilst there are exceptions to the rule, they embrace only cases when a corporation created by one State rests its right to enter another and to engage in business therein upon the Federal nature of the busines."

An extract from Blake vs. McClung, 172 U. S. 255, is cited in counsel's brief (page 58) as tending to show some modification of this doctrine; but which we think shows the contrary. There, a mining corporation in Tennessee became insolvent and its assets under a statute of the State were directed to be distributed among its creditors, but priority was to be given to the Tennessee creditors. Certain creditors in Ohio and a certain corporation of Virginia presented their claims and were postponed by the State courts to the Tennessee creditors.

This court reversed as to the individual non-resident creditors, on the ground that the Tennessee statute deprived the Ohio creditors of the "privileges and immunities" guaranteed to them under Section 2, Art. 4, of the Federal Constitution, but held that the Virginia corporation was not a citizen within the meaning of that clause of the Constitution, and was not therefore protected by it; and moreover that the statutory denial to it of equality with the Tennessee creditors was not in violation of the

provisions of the Fourteenth Amendment, securing persons the equal protection of the laws. And the debt of the corporation was postponed to those of the individual creditors, resident and non-resident. We can find no consolation for counsel in this case.

THE CHIEF CASES IN POINT.

Home Ins. Co. vs. Morse, 20 Wall. 445.

This case, involving a Wisconsin statute, was decided in 1874, Mr. Justice Hunt delivering the opinion for the court. Under the terms of the statute it was made unlawful for a foreign fire insurance company to do business in that State, unless it should first file with the Secretary of State a power of attorney containing an agreement under the seal of the company to the effect that the company would not remove a cause to the Federal courts. The power of attorney so filed in the case involved contained the clause:

> "And said company (meaning the Home Ins. Company) agrees that suits commenced in the State courts of Wisconsin shall not be removed by the act of said company into the United States Circuit or Federal courts."

In certain actions against the company in the State court, the courts of Wisconsin held that the statute and the agreement under it justified a denial of the petition to remove the cause to the United States court.

On appeal to the Supreme Court of the United States, the court held that the agreement was an effort to oust or divest the ordinary tribunals of justice of their jurisdiction; and moreover that the agreement gained nothing from the statute, because that provision of the statute re-

quiring such an agreement was in conflict with the Constitution and laws of the United States which conferred on a citizen under certain conditions the right to go to a Federal court with his case.

The only feature of the Wisconsin law which was involved was the clause requiring the agreement not to remove, and the statute in this particular was held to be unconstitutional and void.

The court concluded as follows:

> "1. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court upon compliance with the terms of the act of 1789.
>
> "2. The statute of Wisconsin is an obstruction to this right: is repugnant to the Constitution of the United States, the laws in pursuance thereof, and is illegal and void.
>
> "3. The agreement of the insurance company derives no support from an unconstitutional statute and is void, as it would be had no such statute been passed."

The question involved the *right of removal* which had been denied by the State court of Wisconsin, and the opinion, of course, must be read in the light of that fact. The question of the power of the State to revoke a permit issued under a valid law or otherwise did not arise.

(2) Doyle vs. Continental Insurance Co., 94 U. S. 535.

This opinion was also delivered by Mr. Justice Hunt, and was decided some two years later than the Home-Morse case. After the decision of the latter case, and because of it, the Continental Insurance Company, a New York corporation doing business in Wisconsin, when sued

in one of the State courts, moved the case to a Federal court, and when Doyle, Secretary of State, on whom the duty involved under the Wisconsin statute of revoking the license of a foreign insurance company if it so removed a case, was threatening to revoke the license for the *sole reason that the company had removed* a case to the Federal court, the company brought its suit to enjoin him from so doing.

The trial court granted the relief and enjoined the secretary from revoking the license. The judgment was reversed by the Supreme Court.

It was urged on appeal to the Supreme Court that the Morse case was decisive of the question, in that it held the statute of Wisconsin to be unconstitutional and void and that those statutes of Wisconsin which denounced penalties for exercising the right of doing business in the State, and which right was sought to be restrained by the statute, were all void, etc.

The purpose of this argument was to show that under the Morse opinion the statute, meaning the *entire* statute, on the subject of requiring licenses, etc., and the agreement under it not to remove being void, neither could be used as the basis or pretext for revoking the license.

The court met this by holding that it was not decided in the Morse case that any part of the Wisconsin statute was unconstitutional except that clause which required the agreement not to remove.

The court said:

> "The opinion of the court must always be read in connection with the facts upon which it is based. Thus, the second conclusion above recited, that the statute of Wisconsin is repugnant to the Constitu-

> tion of the United States and is illegal and void, must be understood as spoken of the provision of the statute under review; that portion thereof requiring a stipulation not to transfer cases to the courts of the United States. The decision was upon that portion of the statute only and other portions thereof, when they are presented, must be judged of upon their merits. We have not decided that the State of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint agents, keep offices, and issue policies in that State."

The court shows then that the State did have such power by citing Paul vs. Va., 8 Wall. 168 (19, 357); Ducat vs. Chicago, 10 Wall. 410; Insurance Co. vs. French, 18 How. 404; and the court said:

> "Neither did the case of Ins. Co. vs. Morse, *supra*, undertake to decide what are the powers of the State of Wisconsin in revoking a license previously granted to an insurance company, for what causes or upon what grounds its action in that respect may be based. No such question arose upon the facts or was argued by counsel or referred to in the opinion of the court. The case here before us does present that point and with distinctness."

The principle was then announced, as having been established by certain cases already referred to, "that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions and restrictions it may think proper that are not repugnant to the Constitution and laws of the United States."

Of course the condition that "no removal should be had to a Federal court" was not one of the conditions here meant by the court as imposable by the State, for the court had just said this could not be done. The court

referred to other terms and conditions in the Wisconsin law which a foreign company had to comply with in order to get admission to the State.

The Wisconsin statute contains a number of conditions prescribed by that law before admission could be granted. The corporation should have $100,000 in paid-up capital to be disclosed by a personal examination of the Commissioner.

The company must file its charter with certain affidavits as to its condition, locality, agent on whom process could be served, etc., and if after the examination the affairs of the company were found "to meet the conditions and requirements of law, the Commissioner shall issue such certificate of admission."

These were evidently the conditions and requirements of the Wisconsin statute, which the court was holding to be valid, or at least was assuming to be valid, because not questioned, and of which it had been theretofore said in the opinion, "their validity was not involved."

So we have a case where there were valid conditions imposed by the State which the companies were to perform before getting a license, and this license, because based and required on unobjectionable terms, was deemed to be a valid license and was not supposed to be tainted with the vice of the license required in the Iowa statute involved in the Barron-Burnside case, to be considered presently.

Now, of such a license as the court was considering in the Doyle case; that is of such a one as the State had a right to issue, because based on valid enforcible conditions, the court, continuing, said:

"The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revokable."

Rector vs. Philadelphia, 24 How. 300.
People vs. Roper, 35 N. Y.; People vs. Comes, 47 N. Y. 501.

The court enforced what it had already said by forceful, and, we think, unanswerable reasoning. And whilst holding that the clause as to removal was repugnant to the Federal Constitution, when imposed as a condition for the license, yet the court held that a State having granted a license, could withdraw it at pleasure, and its reason for doing so, although that reason was the removal of a case to the Feedral court, "was not the subject of judicial inquiry."

"If the State has the power to do an act," said the court, in speaking of its act of withdrawing the license, "its intention, the reason by which it is influenced in doing, can not be inquired into."

This case has certainly never been overruled; and on the contrary it has been referred to as authority, though not in special point on the question involved here, in the cases of:

Fire Association, etc., vs. New York, 119 U. S. 110;
United States vs. Des Moines, etc., 142 U. S. 546;
Pope, etc., vs. Gormelly, 142 U. S. 238;
New Orleans vs. Warner, 175 U. S. 147;
Cable vs. U. S. Life Ins. Co., 191 U. S. 288.

And in the only case where it is supposed to have been shaken in any respect, the conclusion—which is all we ask here—is left wholly unassailed.

We believe that both the reasoning and the conclusions of this opinion are sound, although some portions of its pronouncements were said "not to have been in judgment" in a later case. In connection with that case we will further notice the supposed fault, but it is certain that the question whether injunction would lie to prevent the officer from revoking the license was "in judgment," and this conclusion and determination was in effect approved in the succeeding case and has never been questioned in any case since.

Barron vs. Burnside, 121 U. S. 186.

This is the chief case relied on by opposing counsel.

The Iowa statute, not separable in its parts, the court said, required the application for a permit to be *accompanied by a stipulation* that the permit should be subject to each of the provisions of the act, and one of the provisions was that the permit was to be forfeited if the corporation removed a case to the Federal court.

The permit was thus based on a stipulation of the company made in advance not to remove. An agent of a foreign corporation ignored the law requiring him to apply for a permit based or conditioned on such a stipulation, and *without a permit proceeded to do business.*

One of the sections of the act made this a misdemeanor. The agent was arrested, and although he "urged that the statute of Iowa was void as an attempt to interfere with the jurisdiction of the Feedral courts, as established by the Constitution of the United States and the acts of Congress," the Iowa court "upheld the validity of the statute."

The Supreme Court said that such a statute, requiring such a stipulation, was unconstitutional and void, and the agent was not guilty. The decision is simply to the effect that the State of Iowa did not have a *valid license law.*

And this, because the parts of it which might have been upheld as valid and lawful were so interwoven with the unconstitutional requirement of a void stipulation as to make the whole bad. The court said, "an affirmative provision requiring the filing by a foreign corporation with the Secretary of the State of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the State, might not be an unreasonable or objectionable requirement, if standing alone, but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit, and with the *stipulation referred to,*" (removal stipulation), "shows that the real and only object of the statute and its substantial provision is the requirement of the stipulation not to remove the suit into a Federal court. In view of these considerations, "continued the court," the case falls directly within the decision of this court in Home Insurance Co. vs. Morse, 87 U. S., 20 Wall. 455 (22, 365.)"

The court then concludes the opinion on this branch of the case thus: "As the Iowa statute makes the *right* to a permit dependent upon the surrender by a foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

The thing adjudged in the case is that the State can not prevent the removal, and it can not require a stipulation in advance not to remove, and if such a stipulation

is required in the *application for a license,* no separable provision of an unobjectional character being found in the statute—it renders the whole statute providing for permits unconstitutional and void. That there being therefore no valid statute providing for the issuing or granting of permits to do business in the State, before any is done, the agent who does such business is not guilty of a misdemeanor by reason of doing business without a license. With this conclusion we certainly have no fault to find.

It follows inevitably, we think, from the reasoning of the learned judge delivering the opinion for the court, that had there been an Iowa statute imposing unobjectional requirements only as condition for the permit or imposing unobjectional requirements, together with objectionable ones, but not so "coupled" as to be inseparable, so that on the whole there would have been a valid statute requiring a permit before doing business, then we submit the agent would have been held guilty of a misdemeanor in transacting business without such a permit.

Manifestly the decision does not affect or control the law of a case where a license has been applied for and obtained under a valid law so requiring such a license, or point out the duties or powers of the State or its officers in withdrawing for good or bad reasons the license granted under such valid law.

The validity of the Kentucky Statutes requiring the obtaining of a license on the part of foreign insurance companies before doing business in this State is conceded in the pleadings of the companies and has often been upheld in this court without question.

The companies in fact file their licenses and assert their validity as a ground why they should not be re-

voked. In Franklin Ins. Co. vs. L. & A. Packet Co., 9 Bush, the validity of our license law was pushed to the extent of denying the company the right to recover for insurance premiums in this State without having obtained its license.

When a permit or license is thus required by a valid statute and is obtained by a company, the principles of law under and by which that license may be withdrawn by the State are altogether different from the principles invokable to invalidate a permit *forced* on a protesting company by an illegal and unconstitutional requirement.

The State need not, and possibly some of the States do not, require the companies to obtain a license. When they do require it, the exaction of any stipulation contrary to the Federal law as a *condition precedent* to obtaining the license, puts the matter precisely in the same attitude as if no license had been required.

The license not being required by a valid law, there remains no law in force for punishing the company for doing business without the license—hence the decision discharging the agent in the Barron-Burnside case.

THE KENTUCKY LICENSE LAW.

Section 634 of the statute is as follows:

> "Every insurance company not organized under the laws of this State, before transacting any business in this State, if it has not already done so, shall return to the Commissioner a copy of its charter, articles of association, or deed of settlement, by whatever name its organic law may be called, and the Commissioner, upon being satisfied that such company has fully complied with the laws of

this State, and is possessed of the legal reserve, shall furnish to such agents as the company directs a license to transact business as agent for said company under the seal of the Insurance Department."

If, in order to "fully comply with the laws of the State" within the meaning of this section, it should be found that a company must have agreed in advance not to remove its suits to a Federal court, then our statutes would be as obnoxious as that particular feature of the Wisconsin statute was declared to be in Home Insurance Co. vs. Morse, 20 Wall. 445 (22; 367), or if our statutes anywhere require a stipulation in the application for a license to the effect that no removal to a Federal court would be taken, then the section quoted and the license required under it would be as invalid as the Iowa statute was held to be in the Barron-Burnside case. No such vice is herein found in our statutes. A foreign insurance company desiring to do business in Kentucky must first return to the Commissioner a copy of its charter, articles of association or deed of settlement. (Section 634.)

It must also file with the Commissioner a resolution consenting that service of process upon any agency of the company in this State, or upon the Commissioner of Insurance of this State, in any action brought in this State, shall be a valid service. (Section 631.)

This section, as heretofore shown, is the one providing for revocation if removal is made, but there is nowhere any provision for an agreement or stipulation on the part of the company not to remove.

If the company is already doing business, its license must be renewed annually in the same manner as when the original license was obtained. (Section 633.)

In addition to filing copies of its articles of incorporation or association or foreign insurance companies must file statements annually of their condition on the 31st of December of the year preceding, and certain evidences of their deposits, securities, etc. (Section 657.)

Under the head of "Insurance other than Life," (Section 694) provision is made for the issual and renewal of licenses upon compliance by such companies with the provisions of the law applicable thereto, and in Section 761 the rate of fees for issuing such licenses are fixed. In none of these provisions is any stipulation or agreement required not to remove, and the only provision found on that subject is in Section 631, which is not intended to affect the right to the license, or to be a condition on which the right thereto is based, but merely a provision that on the happening of a removal, the duty of the Commissioner will be to revoke the license. The provision is intended to regulate the action of the Commissioner with respect to the conduct of the company *after* and not *before* it has obtained its license.

So our laws on this subject are not tainted with an unconstitutional condition precedent to the obtaining of the license.

It may be that the court in the Doyle-Continental case might or should have taken the position that the whole of the Wisconsin statute requiring a license for foreign companies was void, and that there was therefore no valid law so requiring. Hence perhaps the basis for the criticism in Barron-Burnside case.

But the court in the Doyle case started with the assumption that there was a valid license issued on terms and conditions that were unobjectionable, and on this

assumption the reasoning of the court is, it seems to us, unassailable.

Given, a valid license issued by a State, with the conceded right to withdraw it at any time, and we maintain that to destroy that right for any reason, good or bad, is to destroy altogether the long-established doctrine that a foreign corporation may do business in another State only with the consent of that State.

We do not believe, when properly construed, that there is any real conflict in these three opinions.

In the Morse case the sole question was, was the statute requiring an agreement not to remove, valid and enforcible?

It was a question of a valid agreement, or not a valid one.

In the Doyle case it was a question of the State's power to revoke with or without a reason, and in disregard of whether it was a good reason or a bad reason.

In the Barron-Burnside case it was a question of the existence in the State of a valid and enforcible license law or an invalid and non-enforcible one.

The course of reasoning in each is not exactly alike, although practically so, and there is no conflict in the conclusions reached on the points involved.

The Doyle case at last was the only one involving the question of the power of the State to revoke a license, which is the *sole question we are now concerned with.*

The opinion of the Court of Appeals in this case, delivered for the court by Judge Hobson, cogently presents the main features of the case thus:

"Our statute is not liable to the objections made to the statutes either in the Morse case or the Barron case. Under our statute the foreign insurance company is at liberty to remove its cause to the Federal court whenever it sees proper. It is required to sign no stipulation or agreement interfering with that right. The regulation is reasonable that the State for the protection of its citizens against unsafe insurance companies should require them before doing business in the State to obtain a license from the Insurance Commissioner, and to furnish him such evidence of their solvency as will protect insurers in this State, before he is authorized to grant them a license. The license which the State grants is purely a matter of grace. and like any other license may be revoked by the licensor at pleasure. The revocation of the license interferes with no legal right of the licensee; for when he takes it, he takes it subject to revocation. He can not question the reason of the licensor for revoking the license, as the State may exclude foreign corporations from doing business in the State with or without reason. If I have a license to cross my neighbor's lot, and he revokes it because I brought a suit against his son, I can not enjoin him from revoking the license on the ground that I had a constitutional right to go to the courts for relief, and that my exercise of a constitutional right was no just reason for revoking the license he had given me; for he had an absolute right to revoke the license, and the fact that he did it out of spite or for a bad reason is immaterial. The State, by her statutes above referred to, in effect, says to the foreign insurance companies, 'I will license you to do business here on the same plane as domestic corporations, and if you come here you must stand on no more favorable ground than the domestic insurance companies. If after you come, you refuse to so stand, I will withdraw my license.' The reason for the statute is not distrust of the Federal courts, but the practical denial of justice that results in a sparsely settled State like ours, if the case must be tried one or two hundred miles from where the party and witnesses reside. Domestic insurance companies enjoy no such immunity, but must try their cases in the

vicinage; the State simply says to the foreign insurance companies, 'I will withdraw my license if you insist on privileges not enjoyed by home companies.' If the State on the day before these suits were filed, by legislative act had withdrawn all license to foreign insurance companies, reciting in the preamble to the act that it was enacted inasmuch as the two cases above referred to had been removed to the United States Circuit Court, could these plaintiffs have complained? If not, how are they affected by the fact that the State acts by an executive officer, and not by special statute? Certainly they can not complain that the license of certain other companies was not revoked.

* * * * * * * * *

"The naked question presented here is, may the State, without cause, revoke a license it has once granted? for a bad reason is no worse than none at all. The distinction is a narrow one, but none the less sound, unless the whole doctrine that the State may grant or withhold a license as it sees fit is to be abandoned. It is juggling with words to say that a State may at will prohibit foreign corporations from doing business in the State (Hooper vs. California, 155 U. S. 650), and yet it may not at will withdraw a license which it has once granted to such corporations.

"It seems to us that the Doyle case rests on sound principles, and that the Barron case in no wise conflicts with it: for that case is by the court expressly put upon the ground that the statute there, when properly construed, fell within the rule laid down in the Morse case. (6 Thompson on Corporations, Sections 7466-67; 13 Am. & Eng. Ency. of Law, page 867; People vs. Pavey, 151 Ill. 101.)"

(4.) Commonwealth vs. East Tennessee Coal Co., 97 Ky. 238.

Here was a coal company of Tennessee selling coal in Whitley County, Kentucky. Upon being sued it exercised its conceded right to take the case to a Federal court.

Thereupon the Commonwealth brought an *equitable action* in which the provision of Section 572 of the statutes of the State was sought to be specifically enforced; which provision is that "if any foreign corporation shall without the consent of the adverse party, remove to a Federal court any action pending against it in any court of this State, * * such action on the part of the corporation shall forfeit its right to transact or carry on any business in this State." A transaction of any business after such removal is made a misdemeanor for which a penalty is provided.

The relief asked in the State's action was that the company be compelled to quit doing business in Kentucky.

The question involved was whether the State or its courts could specifically enforce the provision of the statute forfeiting the right of the company to do business in Kentucky on the ground that it had removed a case to the Federal court.

The State's power to revoke a license granted by it to do business was not involved, because no such license was granted by the State or needed by the company.

The power of the State to sue a foreign corporation and compel it to quit business when it had confessedly violated no valid law is one thing, and the power of the State to withdraw a license granted by it to the corporation is quite another thing. It is simply a question of power and the manner of exercising it.

If a coal company or other trading company move a case to the Federal courts and still transacts business in Kentucky it violates no valid law.

If a foreign insurance company's license be withdrawn by the licensor and the company still attempts to

transact business in the State, it is guilty of doing business without a license. It violates a valid license law imposed by the State.

The case, as well as the kindred one for a fine of Commonwealth vs. Jellico Coal Co., 97 Ky. 246, falls within the principles stated in Barron vs. Burnside and in the Morse case, and the question decided in the Doyle case was in no wise presented.

What is said in the opinion of the Court of Appeals refers to the case of Commonwealth vs. Jellico Coal Co., 97 Ky. 246, and the judge who wrote the opinion becoming suddenly sick, had no opportunity to correct the reference. The section involved in both these cases was the same, viz., Section 572, and affected the matter of "doing business in the State," but no license was required.

No question of the right of complainants to do business in the State is involved here; the simple question is, shall the State be enjoined from revoking a license it has granted? The license from the State sets upon the insurance company the mantle of its approval. It enables the company to say to the people, "I comply with your laws, I have the license of the State; the State thus says to you, I am safe and trustworthy, and you may have no doubt about this." The livery of the State with which the company is thus clothed is a valuable thing, for many persons will trust the company thus endorsed who would not otherwise trust it. This endorsement the sovereign State may withdraw, and the company can not by injunction require the State to continue the endorsement and thus enable it to mislead those with whom it proposes to do

business. The Court of Appeals had this in mind, as shown by the closing words of the opinion, as quoted above.

We respectfully ask an affirmance.

J. H. HAZELRIGG.

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H. R. PREWITT,
HAZELRIGG & HAZELRIGG,
Of Counsel.

POINTS AND AUTHORITIES.

Right of foreign insurance company to do business in State depends solely on consent of State.

Paul vs. Virginia, 8 Wall. 168;
Horn Silver Mining Co. vs. New York, 143 U. S. 305;
Hooper vs. California, 155 U. S. 650;
Blake vs. McClung, 172 U. S. 255; and other cases.

Section 631, Ky. Statutes, is a valid exercise of power to expel a foreign company, and the reasons therefor are immaterial.

Doyle vs. Continental Ins. Co., 94 U. S. 535;
13 A. & E. Ency. Law (2d Ed.), 867;
6 Thompson on Corporations, Sections 7466-7467;
People vs. Pavey, 151 Ill. 101.

And this doctrine is not inconsistent with:

Home Ins. Co. vs. Morse, 20 Wall. 445;
Barron vs. Burnside, 121 U. S. 186;
Com. vs. E. T. Coal Co., 97 Ky. 238;
Com. vs. Jellico Coal Co., 97 Ky. 246.

No agreement or stipulation being required of the company under the statute, it is not repugnant to the Constitution and laws of the United States.

Sec. 631, Kentucky Stat., and cases above.

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SUPREME COURT U.S.

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE SECURITY MUTUAL LIFE INSURANCE CO.,

vs. NO. 178.

H. R. PREWITT, INSURANCE COMMISSIONER AND TRAVELER'S INSURANCE COMPANY,

vs. NO. 184.

SAME.

REPLY TO PETITIONS FOR RE-HEARING.

If permitted, we desire to submit in reply to the petitions, that if, as sought to be now shown, the licenses of the plaintiffs in error, have in fact been renewed since the litigation began under the Statute requiring them to be renewed annually, we can not see how on this account the question involved becomes any less abstract or academic than it was found to be by this Court for the reason that the licenses had expired.

In no event can any relief be granted if the judgments should be reversed. The Courts surely can not be asked to re-instate licenses, which, as is now made to appear, have already been re-instated or renewed.

Again we wholly disagree with Counsel when they argue that a life insurance company can do business in this State

under our Statutes without the actual and literal granting and issual of a license, or permit or certificate authorizing the doing of such business.

(See Sections 631, 633, 634 and 642.)

Nor do we assent to their suggestion that we did not argue the point on which the cases were decided by this Court because we recognized that the question involved was a broader one than the mere life of a particular license or permit.

We omitted to call attention to the fact solely through inadvertence — growing out of the fact that our brief was prepared originally for the Kentucky Court of Appeals, when the question was confessedly a live one, and few changes were made in it for this Honorable Court. In fact, if our attention was ever called to the fact of the renewals, it had escaped us when we submitted our argument.

But in any event omissions of Counsel or even agreements of Counsel will not induce the Court to decide *dead issues*. Indeed any intentional attempt of Counsel to have the Court do so would be in contempt of the Court.

We are not seeking to avoid a decision of these cases on their merits, but can not ask the Court to consider an issue which the lapse of time has already settled under our Statute.

Respectfully submitted,

J. H. Hazelrigg.

For Defendant in Error.